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No. 90-953

in the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

THE STATE OF FLORIDA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF AMICUS STATE 1

STATEMENT OF THE CASE 2

ARGUMENT

ISSUE (RESTATED): IN REJECTING CITY GAS' STATE ACTION DEFENSE, THE COURT OF APPEALS IN EFFECT OVERRULED A HOLDING OF THE STATE SUPREME COURT INTERPRETING A FLORIDA STATUTE AND, IN DOING SO, RULED CONTRARY TO THE ESTABLISHED PRECEDENTS OF THIS COURT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases **Page(s)**

Aero Mayflower Transit Co. v. Bd. of R.R. Comm'ers,
332 U.S. 495 (1947) 5

Albertson v. Millard,
345 U.S. 242 (1953) 5

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,
445 U.S. 87 (1980) 3, 4

City Gas Co. v. Peoples Gas Sys., Inc.,
182 So.2d 429 (Fla. 1965) 3, 5

Consolidated Gas Company of Florida, Inc. v. City Gas Co. of Fla.,
880 F.2d 297 (11th Cir. 1989) 3, 4

Cramp v. Bd. of Public Instruction,
368 U.S. 278 (1961) 5

Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.,
243 U.S. 157 (1916) 5

Garner v. Louisiana,
368 U.S. 157 (1961) 5

Griffin v. Wisconsin,
483 U.S. 868 (1987) 5

Hebert v. Louisiana,
272 U.S. 312 (1926) 5

Hortonville Jr. School Dis. No. 1 v. Hortonville Ed.,
426 U.S. 482 (1976) 5

Kingsley Int. Pic. Corp. v. Regents of N.Y.U.,
360 U.S. 684 (1959) 5

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 5

Morehead v. People of New York ex rel. Tipaldo,
298 U.S. 587 (1936) 5

NAACP v. Button,
371 U.S. 415 (1963) 5

O'Brien v. Skinner,
414 U.S. 524 (1974) 5

Schad v. Borough of Mt. Ephraim,
452 U.S. 61 (1981) 5

Supreme Lodge v. Meyer,
265 U.S. 30 (1924) 5

United States v. Burnison,
339 U.S. 87 (1950) 5

Winters v. New York,
333 U.S. 507 (1948) 5

Statutes and Rules **Page(s)**

15 U.S.C. § 2 3

Ch. 366, Fla. Stat. 3-5

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INTRODUCTION

The State of Florida files this amicus brief in support of Petitioner City Gas Company of Florida's ("City Gas") Petition for Writ of Certiorari.

INTEREST OF AMICUS STATE

By essentially overruling the Supreme Court of Florida's interpretation of a state statute, the Eleventh Circuit's decision below raises an issue of grave concern to

the State of Florida. That issue, upon which resolution of many of the other issues in this case rests, is whether a federal appellate court may ignore a state supreme court's interpretation of a state statute and conduct its own independent review of that statute's applicability. This Court on countless occasions has ruled that the meaning given a state statute by a state's highest court must be accepted by federal courts, whether or not those courts agree with the state court's interpretation. Yet, by its decision below the Eleventh Circuit has seen fit to undermine established United States Supreme Court precedents and disregard the principles of federalism upon which those precedents were founded. To allow such a contrary holding is to deny the State of Florida its sovereignty.

Accordingly, the State of Florida submits this amicus brief in support of the Petition for Writ of Certiorari filed with this Court by the Petitioner City Gas and urges this Court to accept certiorari review in this case so that the State of Florida as well as all states may be assured that the established principles of federalism remain intact.

STATEMENT OF THE CASE

For purposes of this amicus brief, the State of Florida adopts the statement of the case set forth by Petitioner City Gas at pages 2 through 6 of its Petition for Writ of Certiorari.

ISSUE (RESTATED): IN REJECTING CITY GAS' STATE ACTION DEFENSE, THE COURT OF APPEALS IN EFFECT OVERRULED A HOLDING OF THE STATE SUPREME COURT INTERPRETING A FLORIDA STATUTE AND, IN DOING SO, RULED CONTRARY TO THE ESTABLISHED PRECEDENTS OF THIS COURT.

In concluding that City Gas had violated Section 2 of the Sherman Act, 15 U.S.C. § 2, the Eleventh Circuit found, inter alia, that the 1960 territorial agreement between City Gas and Peoples Gas System was not entitled to state action immunity because of the absence of a clearly articulated state policy, thus failing to meet the first prong of the state action test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 87 (1980).

In reaching that conclusion, the Eleventh Circuit acknowledged that the Supreme Court of Florida had validated the precise territorial agreement at issue here in a 1965 opinion wherein the Court found that the predecessor to the Public Service Commission had the implied authority under the state's public utilities regulatory act, Ch. 366, Fla. Stat., to approve territorial agreements between natural gas utilities, *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429 (Fla. 1965). Despite the state supreme court's holding, the Court of Appeals below concluded that the decision was not controlling for purposes of the Eleventh Circuit's analysis under the federal antitrust laws. *Consolidated Gas Company of Florida, Inc. v. City Gas Co. of Fla.*, 880 F.2d 297, 303 (11th Cir. 1989). The Court then went on to conduct an independent review of Ch. 366, Fla. Stat., to determine for

itself whether the Florida Public Service Commission had the authority to approve territorial agreements between natural gas companies and, thus, whether such agreements were part of a clearly articulated state policy to displace competition.

Through its independent review, the Court of Appeals found that because Ch. 366, Fla. Stat., did not expressly convey upon the Public Service Commission the authority to approve territorial agreements between natural gas companies, the Florida legislature had not intended natural gas utilities to enjoy such exclusive territorial agreements, despite the Supreme Court of Florida's conclusion to the contrary. 880 F.2d at 302.

This holding by the Court of Appeals is plainly at odds with years of established precedent from this Court. While the Eleventh Circuit was correct in stating that the issue of "clear articulation" under Midcal was "ultimately a question of federal antitrust law," 880 F.2d at 303, it does not follow that, in applying the Midcal test to the facts before it, a Court of Appeals may blatantly ignore a state supreme court's interpretation of a state statute and then interpret the state statute to the contrary.

The deference to be given by the federal courts to a state supreme court's interpretation of a state statute is likewise a legal principle well established in federal law. This Court has ruled countless times that federal courts must not construe state statutes contrary to the

construction given them by the highest court of a state.[1] Yet, that is precisely what the Eleventh Circuit did below when it in essence overruled the holding in City Gas Co. v. Peoples Gas Sys., Inc.

The Supreme Court of Florida's exact ruling in that case as it pertained to the specific territorial agreement at issue here was that Florida Public Service Commission, then known as the Florida Public Utilities Commission, "has adequate implied authority under Ch. 366, Fla. Stat. to validate such agreements as the one before it." 182 So.2d at 436. Such a forthright statement can be reasonably construed only one way. As Petitioner City Gas states in its Petition for Writ of Certiorari, in holding as it did, the Supreme Court of Florida "put[] these words in the statute as definitely as if it had been so amended by the legislature." [City Gas Petition at 17, citing *Winters v. New York*, 333 U.S. 507, 514 (1948)]. Because the Eleventh Circuit's opinion is clearly at odds with at least a century of U.S. Supreme Court decisions as well as the numerous circuit courts of appeals opinions which, as

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[1]See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.9 (1978); *Hortonville Jr. School Dis. No. 1 v. Hortonville Ed.*, 426 U.S. 482, 488 (1976); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 285 (1961); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961); *Kingsley Int. Pic. Corp. v. Regents of N.Y.U.*, 360 U.S. 684, 688 (1959); *Albertson v. Millard*, 345 U.S. 242, 244 (1953); *United States v. Burnison*, 339 U.S. 87, 90 (1950); *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'ers*, 332 U.S. 495, 499-500 (1947); *Morehead v. People of New York ex rel. Tipaldo*, 298 U.S. 587, 609 (1936); *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926); *Supreme Lodge v. Meyer*, 265 U.S. 30, 32 (1924); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 166 (1916).

petitioner notes, have addressed this issue in the context of the state action doctrine (see note 17 of City Gas Petition at 17), the State of Florida urges this Court to grant certiorari in this case so that the State of Florida, as well as all states, may be assured that the principles of federalism and state sovereignty remain whole.

CONCLUSION

Based on the foregoing, the State of Florida submits that this Court should grant Petitioner City Gas' Petition for Writ of Certiorari.

Dated: January 15, 1991

Respectfully submitted,

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